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ABSTRACT

Litigation of handicapped students' and employees' rights continued at a significant level in 1988. Requests for attorneys' fees under the Handicapped Children's Protection Act was the focus of the greatest number of cases. As in 1987, two major issues were raised in these cases: the availability of fees for administrative hearings and the constitutionality of the retroactive application of the law. Cases are summarized under the following topics: (1) entitlement to services; (2) procedural safeguards; (3) placement; (4) related services; (5) discipline; (6) remedies; (7) federal funding; (8) state law; and (9) discrimination under the Rehabilitation Act, Section 504. (MLF)

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HANDICAPPED

Nelda H. Cambron-McCabe

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INTRODUCTION

Litigation of handicapped students' and employees' rights continued at a significant level in 1988. Requests for attorneys' fees under the Handicapped Children's Protection Act was the focus of the greatest number of cases. As in 1987, two major issues were raised in these cases: the availability of fees for administrative hearings and the constitutionality of the retroactive application of the law.

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The most widely-publicized case was the United States Supreme Court's decision in *Honig v. Doe*.[1] In addressing the expulsion of a handicapped student, the Court held that unilateral exclusion in excess of ten days for conduct related to the student's disability is a prohibited change in placement under the Education of the Handicapped Act (EHA). The Court declined to recognize a "dangerousness" exception to the stay-put requirement.

ENTITLEMENT TO SERVICES

The judiciary continues to address the level of educational services students must be provided under the EHA. The United States Supreme Court has not prescribed a specific substantive educational standard but rather stated that an educational program should be sufficient to confer some educational benefit, that is, "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."[2] Relying on the Supreme Court's interpretation of the EHA and the frequent references in the statute and legislative history to "full educational opportunity," the Third Circuit Court of Appeals concluded that more than *de minimus* benefit is required.[3] The court held that *some benefit* "connotes an amount of benefit greater than mere trivial advancement."[4] Because it appeared that under the federal district court's ruling in this case that *any benefit* would constitute an appropriate education, the case was remanded.

States are required to provide special education services to students eighteen years and older only if they provide programs for nonhandicapped students in that age group. A Nebraska parent claimed that his son was entitled to be educated until he reached twenty-two years of age. While the court recognized that the EHA language could be read as inclusive, deferrence to state law restricted enrollment. Nebraska law provides that students will be educated "to age twenty-one," which the court interpreted as "until" age twenty-one.[5] Similarly, the Supreme Court of Wyoming held that neither state nor federal funds could be used for educational programs after a student reached the age of twenty-one.[6]

Handicapped children with Acquired Immune Deficiency Syn-

1. 108 S. Ct. 592 (1988).
2. Board of Educ. of the Hendrick Hudson Cent. School Dist. v. Rowley, 458 U.S. 176, 200 (1982).
3. Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3d Cir. 1988).
4. *Id.* at 183.
5. Monahan v. School Dist. No. 1 of Douglas County, 425 N.W.2d 624 (Neb. 1988).
6. Natrona County School Dist. No. 1 v. Ryan, 764 P.2d 1019 (Wyo. 1988). *See also* Natrona County School Dist. No. 1 v. McKnight, 764 P.2d 1039 (Wyo. 1988); State v. Cochran, 764 P.2d 1037 (Wyo. 1988).

drome (AIDS), AIDS-Related Complex (ARC), or the Human T-Lymphotropic Virus (HTLV-III) are entitled to receive special education services. In granting a preliminary injunction, an Oklahoma federal district court held that a state law regarding contagious diseases could not be used to bar the attendance of an emotionally disabled child who tested positive for the HIV virus; EHA pre-empts state law.[7] A Florida federal district court, however, denied a motion for a preliminary injunction to admit an incontinent, trainable mentally handicapped child diagnosed as having ARC.[8] The court concluded that the plaintiffs did not establish the likelihood that they would succeed on the merits of the case at trial and failed to show that the harm to the child caused by the denial of attendance outweighed the potential harm to others.

PROCEDURAL SAFEGUARDS

Extensive procedural safeguards are identified in the EHA to ensure that all handicapped students receive a free appropriate public education (FAPE) through proper identification, evaluation, and placement. The Fourth Circuit Court of Appeals has noted that "failures to meet the Act's procedural requirements are adequate grounds by themselves for holding that a school board failed to provide a FAPE."[9] Prior to the evaluation of a child, parents must be informed of their procedural rights, including a description of the process and procedures, and of the right to an impartial due process hearing to present complaints. After approval of the individualized education program (IEP), any changes in the program also must be preceded by procedural safeguards. The judiciary continues to interpret specific procedural rights and assess school officials' compliance with the Act.

Rights of Parents and Guardians

According to the Supreme Court, the individualized education program is the "centerpiece" of the EHA's procedural scheme.[10] This mechanism ensures parental participation in the development of a student's educational program. The Third Circuit Court of Appeals, however, noted that the procedural protection exists only "if the state devises an *individualized* program and is willing to address the handicapped child's

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7. Parents of Child, Code No. 870901W v. Coker, 676 F. Supp. 1072 (E.D. Okla. 1987).

8. Martinez v. School Bd. of Hillsborough County, Fla., 675 F. Supp. 1574 (M.D. Fla. 1987). At trial, however, the district court ruled that the child must be served in the public school but with certain restrictions. *See* text with note 49, *infra*.

9. Board of Educ. of Cabell County v. Dienelt, 843 F.2d 813, 815 (4th Cir. 1988), *quoting* Hall v. Vance, 774 F.2d 629, 635 (4th Cir. 1985).

10. Honig v. Doe, 108 S. Ct. 592, 598 (1988).

unique needs.'"[11] Parents in this case claimed that their child was denied an appropriate education because a local school district policy did not permit, under any circumstances, direct physical therapy. Concluding that a rigid rule would interfere with a child's procedural rights, the appellate court remanded the case for further inquiry.

To assure a child a free appropriate public education, parents must be involved in the development of the IEP. The Fourth Circuit Court of Appeals held that a Virginia school district violated the EHA procedures by determining a child's placement and then developing an IEP to support the decision.[12] In the court's words, such an action violates the "spirit and intent" of parental involvement required in the EHA.

Parents must be informed of changes in a child's educational program. The District of Columbia Court of Appeals found that the suspension of instruction to a handicapped student because of health problems without notifying the surrogate parent violated the EHA.[13] The failure of the parent, however, to pursue administrative remedies after notification prevented recovery of relief for any deprivations from that date.

The Eighth Circuit Court of Appeals reaffirmed that parents may challenge EHA due process procedures of local and state agencies under 42 U.S.C. section 1983.[14] The Handicapped Children's Protection Act of 1986 firmly established that the EHA is not the exclusive means of enforcing handicapped children's rights.[15] A New York federal district court also granted a motion to amend a claim for damages under section 1983.[16]

Change in Placement

If parents desire a change in their child's placement, they must initiate a change. In an Eighth Circuit Court of Appeals case, the school officials and parents had agreed that a change in placement was needed, but the school district was never given an opportunity to propose an alternative placement.[17] There was no evidence to indicate that the school officials were unwilling to consider a range of placement options, including out-of-state residential schools. Accordingly, the appellate court ruled that the parents assumed the financial risk for the unilateral change.

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11. Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 177 (3d Cir. 1988).
12. Spielberg v. Henrico County Pub. Schools, 853 F.2d 256 (4th Cir. 1988).
13. Abney v. District of Columbia, 849 F.2d 1491 (D.C. Cir. 1988).
14. Digre v. Roseville Schools Indep. Dist. No. 623, 841 F.2d 245 (8th Cir. 1988).
15. 20 U.S.C. § 1415.
16. Hiller v. Board of Educ. of Brunswick Cent. School Dist., 687 F. Supp. 735 (N.D.N.Y. 1988).
17. Evans v. District No. 17 of Douglas County, Neb., 841 F.2d 824 (8th Cir. 1988).

A Michigan federal district court held that a school district is entitled to evaluate a child prior to recommending a change in placement but is not required to leave the state to conduct such an evaluation when parents have unilaterally removed the child.[18] The court rejected the parents' contention that only the evaluations supplied by a private school should be considered.

Although a District of Columbia child was not appropriately placed in a public school program and placement in a private school was held to be appropriate, the federal district court denied parents' request that the school district be prohibited from changing the placement for two years.[19] Under the EHA, a school district is required to review each handicapped child's IEP annually.

The "stay put" or "status quo" rule of the EHA provides that "[d]uring the pendency of any proceedings conducted . . . unless the state or local educational agency and the parents or guardian otherwise agree, the child shall remain in the current educational placement . . . ."[20] The statute ensures that prior to the completion of the administrative and judicial review children will not be removed either from a regular classroom or a special education program over the parents' objection.

Courts assessing the stay put requirement in 1988 relied extensively on the United States Supreme Court's interpretation of the provision in *Honig v. Doe*.[21] Specifically, they referenced the Court's finding that the language of section 1415(e)(3) is "unequivocal"—"the child *shall* remain in the then current educational placement."[22] In denying an exception to the stay-put mandate even for students who are violent or dangerous, the Court further elaborated:

> We think it clear . . . that Congress very much meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students . . . from school. In so doing, Congress did not leave school administrators powerless to deal with dangerous students; it did, however, deny school officials their former right to "self-help," and directed that in the future the removal of disabled students could be accomplished only with the permission of the parents or, as a last resort, the courts.[23]

In construing the meaning of the stay put requirement, courts are frequently asked to determine which placement is a child's "current educational placement." In a District of Columbia case, the current

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18. Lenhoff v. Farmington Pub. Schools, 680 F. Supp. 921 (E.D. Mich. 1988).
19. Kattan v. District of Columbia, 691 F. Supp. 1539 (D.D.C. 1988).
20. 20 U.S.C. § 1415(e)(3).
21. 108 S. Ct. 592 (1988). *See* text with note 83, *infra*.
22. *Id.* at 604.
23. *Id.*

educational placement, a private day school, was unavailable for the 1987-88 school year.[24] The parents objected to the public school program recommended by the school district and chose to enroll their son in another private school. The federal district court held that where the current placement is not available a district must locate a "comparable and appropriate program," which in this case was a private education facility. The district's failure to provide such an option during the pendency of review violated the EHA. Consequently, the program selected by the parents was found to be appropriate and the placement proposed by the district was not.

The Eighth Circuit Court of Appeals concluded that the current educational placement of a child who had been classified as handicapped and subsequently attended school in another district for one month in the regular education program was still the special education program when he returned to the district.[25] The parent argued that his current placement was the regular classroom because he was transferring into the district as a regular student. The court held that his history as a special education student within the school district dictated his placement during the pendency of the review process to determine an appropriate placement.

In the first case at the federal level to address whether graduation is a change in educational placement, a New York district court agreed with the Massachusetts high court that it "can hardly be characterized as anything other than a change in placement."[26] The school district argued that the student did not qualify for the protection of the EHA because he had been issued a diploma. The parents disagreed and requested an impartial hearing, claiming that their son was not properly graduated. Concluding that graduation is a change in placement, the court held that a violation of the stay put requirement justified an automatic preliminary injunction.[27] While the court found it unnecessary to apply the traditional standard for granting injunctive relief, it stated that the same results would have been reached because the student could show irreparable harm and the likelihood of success on the merits of the claim.

A California federal district court initially denied a preliminary injunction against the unilateral change in a child's educational and residential placement through termination of the child's funding at the

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24. Knight v. District of Columbia, 691 F. Supp. 1567 (D.D.C. 1988).

25. Digre v. Roseville Schools Indep. Dist. No. 623, 841 F.2d 245 (8th Cir. 1988).

26. Cronin v. Board of Educ. of East Ramapo Cent. School Dist., 689 F. Supp. 197, 203, *quoting* Stock v. Massachusetts Hosp. School, 467 N.E.2d 448, 453 (Mass. 1984).

27. In a footnote, the court commented that the pendency provisions of the EHA could not be avoided by a school district graduating students. Failure to accept that position would render the stay put provision meaningless; school districts could simply terminate services by the conferral of diplomas.

Behavior Research Institute of California, Inc. (BRI), a residential community care facility.[28] The court based its denial on the lack of evidence that the placement was made for educational purposes. In granting reconsideration of the order, the court invoked the stay put provision and issued a preliminary injunction restraining the Department of Social Services and a nonprofit community agency from altering the child's placement during the pendency of the hearings.[29] Subsequently, in a third case, the Department of Social Services, attempting to revoke the license of BRI, requested clarification of the court's preliminary injunction order, and BRI at the same time urged the court to interpose the preliminary injunction to prevent revocation of its license.[30] The court recognized the authority of the Department of Social Services to determine independently the adequacy of private institutions to provide services without the necessity of providing prior notice and a hearing to parents. Such a determination is not directed toward a specific individual. The court, however, did caution that the Department of Social Services could not use revocation of BRI's operating license as a means to change this specific child's placement.

Administrative Remedies

If parents disagree with the placement of their child or any aspect of the educational program, they can request an impartial due process hearing. The hearing may be conducted by the local school district, the state agency, or an intermediate agency. The statute prohibits employees of units who are involved in the education of the child from serving as hearing officers. Two courts, joining a growing number of courts, also held that employees of the state education agency are not eligible to conduct reviews. The Third Circuit Court of Appeals reasoned that the secretary of education is an employee with extensive fiscal and regulatory control over local school districts and, therefore, unable to conduct impartial reviews.[31] Similarly, a New York federal district court in granting a preliminary injunction, concluded that the commissioner of education is not a constitutional officer but an employee. As such, parents were likely to prevail on the claim that they were denied an impartial hearing.[32]

The Second Circuit Court of Appeals found a New York two-tier

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28. Corbett v. Regional Center for the East Bay, Inc., 676 F. Supp. 964 (N.D. Cal. 1988).

29. Corbett v. Regional Center of the East Bay, Inc., C-87-5322 SAW, discussed at 699 F. Supp. 230 (N.D. Cal. 1988).

30. Corbett v. Regional Center of the East Bay, Inc., 699 F. Supp. 230 (N.D. Cal. 1988).

31. Muth v. Central Bucks School Dist., 839 F.2d 113 (3d Cir. 1988). *See also* Burr v. Ambach, 863 F.2d 1071 (2d Cir. 1988).

32. Holmes v. Sobol, 690 F. Supp. 154 (W.D.N.Y. 1988).

state review process inconsistent with the EHA.[33] After an initial hearing by a review officer appointed by the state educational agency, review by the commissioner of education was held to be improper.[34]

The District of Columbia Court of Appeals concluded that courts must give deference to a hearing officer's decision.[35] While the court noted that less deference may be required because of courts' authority to supplement the proceedings with additional evidence, courts should not substitute their judgment. The court advanced a formula for the district court to apply on remand: "that a party challenging the administrative determination must at least take on the burden of persuading the court that the hearing officer was wrong, and that a court upsetting the officer's decision must at least explain its basis for doing so."[36]

Under the EHA, parents or guardians must exhaust administrative procedures prior to seeking judicial review of educational placement or services decisions. Three federal district courts declined to review claims because parents had failed to invoke the available administrative procedures.[37] In one of the cases, the parents maintained that exhaustion was not required because the suit also was filed under 42 U.S.C. section 1983, which does not require exhaustion before judicial consideration.[38] Relying upon section 1415(f) of the EHA, the court rejected this argument, noting that the statute requires that prior to claims under other laws providing relief similar to the EHA individuals must exhaust the EHA administrative remedies.

Exhaustion of administrative remedies is not required if such an attempt would be futile.[39] The Ninth Circuit Court of Appeals found it unnecessary for a parent association seeking adequate funds to continue the educational programs in a private facility to pursue a due process hearing.[40] Initially, the plaintiffs requested and were denied a hearing from both the local school district and the state agency responsible for administering state funds. Maintaining that exhaustion of administrative remedies was still required prior to judicial review, the state argued that

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33. The EHA provides that states may establish a one-tier or two-tier review system. Under a one-tier system, an impartial hearing is conducted by the state educational agency. Under a two-tier system, a local hearing is conducted and the losing party may appeal to the state level.

34. Burr v. Ambach, 863 F.2d 1071 (2d Cir. 1988). *See also* Antkowiak v. Ambach, 838 F.2d 635 (2d Cir. 1988) (expressed doubt about the extra procedural step in the New York administrative review procedures).

35. Kerkam v. McKenzie, 862 F.2d 884 (D.C. Cir. 1988).

36. *Id.* at 887.

37. Browning v. Evans, 700 F. Supp. 978 (S.D. Ind. 1988); Laura V. v. Providence School Bd., 680 F. Supp. 66 (D.R.I. 1988); Secor v. Richmond School Joint Dist. No. 2 Lisbon-Pewaukee, 689 F. Supp. 869 (E.D. Wis. 1988).

38. Laura V. v. Providence School Bd., 680 F. Supp. 66 (D.R.I. 1988).

39. *See* Honig v. Doe, 108 S. Ct. 592 (1988).

40. Kerr Center Parents Ass'n v. Charles, 842 F.2d 1052 (9th Cir. 1988).

the role of the court should be to order an administrative hearing, not consider the merits of the case. The court rejected this assertion, concluding that the parents did pursue the specified procedures and, furthermore, a hearing would be useless since the lack of financial resources could not be adequately considered in the administrative process.[41]

The Fourth Circuit Court of Appeals ruled that a parent was not required to reexhaust administrative remedies when the school district changed its proposed placement.[42] The parent's original request to have her child placed in a neighborhood school was not affected by the district's new proposal. While the new program was not reviewed in the administrative hearings and ordinarily would require remand, the court noted that under the EHA courts may hear new evidence, negating the necessity for reexhaustion. Similarly, the District of Columbia Federal District Court held that parents are not required continually to initiate a new administrative review for each school year while they are in the midst of pursuing administrative proceedings.[43] The court stated that the school system's "draconian view of the system would consign plaintiffs to multiple hearings and a never-ending series of conflicts."[44]

An Illinois federal district court ruled again in 1988 that EHA and its administrative remedies apply to AIDS victims "*only* if their physical condition is such that it adversely affects their educational performance."[45] In this case, the student, who was being taught under an individualized education program in a special education program, requested declaratory and injunctive relief against the school district after being placed in a separate modular classroom. The court held that exhaustion of administrative remedies was not required because the student's learning and behavioral problems were not related to his health condition, which prompted the separation from other students. AIDS alone is not a handicap under the EHA.

PLACEMENT

After agreement is reached on a child's IEP, an appropriate placement must be made at public expense. Alternative placements may include a regular classroom with support services, a regular classroom

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41. While the issue of whether parents had exhausted their administrative remedies had been resolved below, a New York appellate court reaffirmed on appeal that the process may be by-passed when it would be futile. Behavior Research Institute v. Ambach, 535 N.Y.S.2d 465 (App. Div. 1988).

42. DeVries v. Spillane, 853 F.2d 264 (4th Cir. 1988). *See* Yearbook of Education Law 1988 at 113 n.18 (district court had ordered further exhaustion of procedures).

43. Holmes v. District of Columbia, 680 F. Supp. 40 (D.D.C. 1988).

44. *Id.* at 43.

45. Robertson v. Granite City Community Unit School Dist. No. 9, 684 F. Supp. 1002, 1005 (S.D. Ill. 1988). *See* Yearbook of Education Law 1988 at 110.

supplemented with resource room instruction, self-contained special classes, home instruction, and hospital or institutional instruction. Within this continuum of placements, a child must be educated in the least restrictive environment, which may be in a public or private school system depending on the needs of the child and the availability of an appropriate program.

Least Restrictive Environment

The EHA provides that "to the maximum extent appropriate, handicapped children . . . are to be educated with children who are not handicapped, and that . . . removal of handicapped children from the regular educational environment [should occur] only when the nature or severity of the handicap is such that education in regular classes with use of supplementary aids and services cannot be achieved satisfactorily."[46]

In rejecting reimbursement for a residential placement, the Eighth Circuit Court of Appeals stated that "children who can be mainstreamed should be mainstreamed, if not for the entire day, then for part of the day; similarly, children should be provided with an education close to their home, and residential placements should be resorted to only if these attempts fail or are plainly untenable."[47] The parents had unilaterally placed their mentally handicapped child in a residential facility without giving the school district an opportunity to explore less restrictive placements. A Georgia federal district court also found a proposed public school program appropriate rather than a residential placement because it represented the least restrictive environment for meeting a child's educational needs.[48]

The least restrictive appropriate environment for an incontinent, trainably mentally handicapped (TMH) child with AIDS was addressed in a Florida case.[49] The parents claimed that a TMH classroom was the appropriate placement while the school district argued that the child must be educated in a homebound instruction program. The federal district court, concluding that the Rehabilitation Act of 1973 did not add to the rights available under the EHA, assessed the claim solely on the basis of the EHA entitlement to a free appropriate public education. In balancing the rights of the handicapped child against the risks posed for other students, the court recommended a restricted public school placement. Specifically, the court ordered the construction of a separate

46. 20 U.S.C. § 1415 (e).

47. Evans v. District No. 17 of Douglas County, Neb., 841 F.2d 824, 832 (8th Cir. 1988).

48. Hall v. Freeman, 700 F. Supp. 1106 (N.D. Ga. 1987).

49. Martinez v. School Bd. of Hillsborough County, Fla., 692 F. Supp. 1296 (M.D. Fla. 1988).

room (noting size and design features) within the TMH classroom and the provision of a full time aide.

On appeal, the Eleventh Circuit Court of Appeals vacated the district court's decision and remanded the case for further proceedings.[50] The court of appeals emphasized that handicapped children possess distinct rights under both the EHA and the Rehabilitation Act, which form a "particularly intricate" relationship when invoked by a child with an infectious disease.[51] Together, the two statutes form a complementary set of standards that must be used to assess the appropriateness of a child's placement.[52] First, the appropriate placement under the EHA must be established. Second, a determination must be made as to whether the child is "otherwise qualified" to participate in the program, despite the contagious disease. Third, if the child is not otherwise qualified, the court must assess whether reasonable accommodations can reduce the risk to others. The court elaborated that "[i]n considering accommodations that would make the child 'otherwise qualified,' the court must bear in mind the requirement that to the maximum extent appropriate, the child is to be educated in the least restrictive environment."[53] Furthermore, the appellate court noted that the "remote theoretical possibility" of transmission found by the trial court did not pose a risk level significant enough to justify exclusion from the classroom.[54]

Three cases addressed the issue of mainstreaming for hearing impaired students. The issue arose in the context of determining the appropriate methodology for educating these handicapped children. Different philosophical positions exist regarding whether hearing impaired children should be educated in segregated or nonsegregated schools and whether oral-aural instruction, manual instruction, total communication, or cued speech should be employed. In a Pennsylvania case, a hearing impaired mother argued that the appropriate placement for her two hearing impaired children was their current private school placement utilizing oral-aural instruction.[55] This method seeks to maximize the development of students' residual hearing with minimal reliance on lip reading. The school district recommended placement in its hearing impaired education program employing the total communication approach—combining lip reading, a hearing aid, and sign language. In this case, the court did not attempt to identify the best method for educating hearing impaired children but rather to assess whether the proposed school district place-

50. Martinez v. School Bd. of Hillsborough County, Fla., 861 F.2d 1502 (11th Cir. 1988).
51. *Id.* at 1505.
52. *Id.*
53. *Id.* at 1506.
54. *Id.*
55. Visco v. School Dist. of Pittsburgh, 684 F. Supp. 1310 (W.D. Pa. 1988).

ment was appropriate. While acknowledging congressional preference for mainstreaming, the federal district court, citing extensively from the 1988 report of the Commission on Education of the Deaf presented to the President and Congress, recognized that a segregated school for deaf children in some instances may be the least restrictive environment. In assessing the appropriateness of the students' placement, the court relied on EHA regulations stating that "[i]n selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services he or she needs."[56] After weighing the potential harmful effects of altering the students' placement, the court found no basis for interrupting their successful educational programs by introducing a different method of teaching merely for the sake of mainstreaming for a few years.

In an Illinois case, the parents sought to enjoin the school district from assigning their hearing impaired son to a self-contained classroom and requiring him to learn sign language. The parents advocated placement in the neighborhood school in a regular classroom with the assistance of a cued speech instructor. Although the federal district court characterized the disagreement as one involving teaching methodology and dismissed the complaint, the parents asserted that the school district's proposed program did not satisfy the EHA's least restrictive environment provision. The Seventh Circuit Court of Appeals affirmed the decision, finding the mainstreaming and methodology issues inseparable; mainstreaming simply cannot be evaluated in the abstract.[57] The school district was held to be responsible for selecting the teaching method most appropriate to a child's needs; the teaching approach then determines the delivery system. Under the EHA, parents do not have the right to demand a specific methodology or program.

A Michigan federal district court held that a parent of a hearing impaired child failed to show that a proposed public school program in the least restrictive environment was not appropriate under the EHA.[58] The court found the basic disagreement in this case to revolve around mainstreaming versus a segregated school. While recognizing the significant emotional, cultural, and social advantages of a special school, the court concluded that the public school program would still enable the student to develop her maximum potential as required by state law.

Private Facilities

Public school districts are required to place handicapped students in private facilities only if an appropriate public placement is not available.

56. *Id.* at 1315.
57. Lachman v. Illinois State Bd. of Educ., 852 F.2d 290 (7th Cir. 1988).
58. Barwacz v. Michigan Dep't of Educ., 681 F. Supp. 427 (W.D. Mich. 1988).

If parents place their children in such facilities when an appropriate public school program is available, they must pay the costs. However, under the Supreme Court's 1985 decision in *Burlington School Committee v. Department of Education*, parents who unilaterally place their children in a private facility pending resolution of a placement may be awarded tuition reimbursement if it is later determined that the private placement is appropriate and the public school placement is inappropriate.[59]

Again in 1988, courts reviewed a number of cases involving parental requests for tuition reimbursement for unilateral private placements of their handicapped children. The Eleventh Circuit Court of Appeals affirmed a federal district court's decision that the proposed placement of a handicapped child with numerous physical and emotional problems in a state mental hospital was an inappropriate placement.[60] Testimony from experts, including the hospital staff, indicated that the hospital was not equipped to address the specific needs of the child and that she would not benefit educationally from the placement. Finding the out-of-state private placement arranged by the parent appropriate, the court ordered the school district to reimburse the parent's costs.

The Third Circuit Court of Appeals awarded a Pennsylvania parent reimbursement for his son's private placement in 1983-84.[61] The initial IEP proposed by the school district was found inadequate, while the parent's placement was deemed to be appropriate. The Fourth Circuit Court of Appeals ruled that the parents were entitled to reimbursement of private school costs because the school district did not provide their child a free appropriate public education.[62] By not conducting a required multi-disciplinary review of the child's program and by not involving the parents in the development of the IEP, the school district was found to have "utterly failed" to identify the child's special educational needs.

A federal district court repeated an earlier order requiring the District of Columbia school district to reimburse parents for a private placement.[63] The school district claimed that the parents were not entitled to reimbursement because the court failed specifically to find their proposed placement inappropriate. The court disagreed, citing explicit language from the opinion that addressed the inappropriateness of the public school program.

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59. 471 U.S. 359 (1985). See The Yearbook of School Law 1986 at 128-29.

60. Jefferson County Bd. of Educ. v. Breen, 694 F. Supp. 1539 (N.D. Ala. 1987), *aff'd*, 853 F.2d 853 (11th Cir. 1988).

61. Muth v. Central Bucks School Dist., 839 F.2d 113 (3d Cir. 1988).

62. Board of Educ. of Cabell County v. Dienelt, 843 F.2d 813 (4th Cir. 1988). The court also rejected retroactive imposition of a state adopted statute of limitations for appealing state due process hearings.

63. Holmes v. District of Columbia, 680 F. Supp. 40 (D.D.C. 1988).

In a Virginia case a hearing officer's conclusion that a public school placement was inappropriate was upheld by a state appellate court. Although a lower court had disagreed with the hearing officer, the appellate court found that the evidence showed the child had not benefited from almost five years in the public school instructional program and in a brief period of time had made significant progress in the private placement.[64]

A Georgia parent's demand for tuition reimbursement for a private residential placement for her emotionally disturbed son was denied. Based on the evidence presented, the federal district court found the program proposed by the school district to be the appropriate placement for the particular problems of the child.[65] Although there was an indication that the child's home environment contributed to his problems, the court found no intrinsic educational need that would require residential placement.

In 1987 a New York federal district court awarded reimbursement for tuition to a parent who had placed his child in an unapproved private school. The court justified the order of reimbursement and continued placement on the fact that the commissioner of education had not been able to locate an appropriate alternative placement.[66] The Second Circuit Court of Appeals reversed the decision, holding that the district court had no authority to order the placement.[67] Under the EHA, handicapped children can be educated in private facilities only if they meet state educational standards. The court order specifically violated a New York standard that requires all contracts between local school districts and private schools for the educaton of handicapped children to be approved by the commissioner of education. In a subsequent case, another New York federal district court followed the Second Circuit Court's decision, ruling that parents were not entitled to reimbursement for private school tuition paid to an unapproved facility.[68]

The District of Columbia Federal District Court concluded that the public school system's proposed placement was inappropriate because the system was unable to provide all services required to conform to the child's IEP.[69] The school system argued that it could provide the services but the evidence indicated that a significant number of students in need of the service in the schools were not being served.

In another case, the District of Columbia Court of Appeals remanded

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64. Beasley v. School Bd. of Campbell County, 367 S.E.2d 738 (Va. Ct. App. 1988).
65. Hall v. Freeman, 700 F. Supp. 1106 (N.D. Ga. 1987).
66. *See* Yearbook of Education Law 1988 at 117-18.
67. Antkowiak v. Ambach, 838 F.2d 635 (2d Cir. 1988).
68. Hiller v. Board of Educ. of Brunswick Cent. School Dist., 687 F. Supp. 735 (N.D.N.Y. 1988).
69. Kattan v. District of Columbia, 691 F. Supp. 1539 (D.D.C. 1988).

a 1987 case, which supported a private placement.[70] The appellate court found no explanation for a rejection of the hearing officer's determination that the public school placement was appropriate. It appeared to the appellate court that the lower court relied on a potential-maximizing standard or simply substituted its judgment for that of the hearing officer.

The eleventh amendment was raised as a bar to the recovery of tuition costs in several cases. Under the eleventh amendment, states cannot be sued in federal courts unless they consent through waiver of immunity or Congress expressly abrogates immunity. The Supreme Court's determination that Congress did not abolish states' immunity to suit in the Rehabilitation Act of 1973 has raised questions regarding states' immunity to suits under the EHA.[71] The Ninth Circuit Court of Appeals, relying on its earlier opinion in *Doe v. Maher*,[72] held that Congress had not expressed an unmistakable intent to abrogate states' immunity pursuant to its fourteenth amendment enforcement powers, nor had it conditioned the receipt of funds on the states' waiver of immunity.[73] The Third Circuit Court of Appeals, however, concluded that the EHA and its legislative history "leave no doubt" that Congress intended to abrogate states' immunity.[74] The court specifically noted congressional language in the preamble to the law: "it is in the national interest that the [f]ederal government assist [s]tate and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law."[75] While the Third Circuit Appellate Court joins the First Circuit Court of Appeals in holding that the EHA authorizes suits against states for costs, the Seventh, Eighth, and Ninth Circuit Appellate Courts disagree.[76] The Supreme Court granted certiorari to address the issue.

Related Services

The EHA specifies that an appropriate education includes special education *and* related services "required to assist a handicapped child to

70. Kerkam v. McKenzie, 862 F.2d 884 (D.C. Cir. 1988). *See* Yearbook of Education Law 1988 at 119.

71. *See* Yearbook of School Law 1986 at 139-41.

72. 793 F.2d 1470 (9th Cir. 1986), *aff'd sub nom.* Honig v. Doe, 108 S. Ct. 592 (1988). While the Supreme Court affirmed the Ninth Circuit Court's decision, the question of whether a state can be required to provide services when a local school district does not provide them was affirmed by an equally divided vote without discussion.

73. Kerr Center Parents Ass'n v. Charles, 842 F.2d 1052 (9th Cir. 1988). *See also* Hiller v. Board of Educ. of Brunswick Cent. School Dist., 687 F. Supp. 735 (N.D.N.Y. 1988) (eleventh amendment bars monetary relief).

74. Muth v. Central Bucks School Dist., 839 F.2d 113 (3d Cir. 1988), *cert. granted*, 109 S. Ct. 52 (1988).

75. *Id.* at 128.

76. *Id.* at 129.

benefit from special education."[77] The Third Circuit Court of Appeals emphasized the important role of related services in the educational program of some handicapped children.[78] The court noted that students with severe physical disabilities may require related services, such as physical therapy, as a prerequisite to classroom instruction or may require a program largely consisting of such therapy. In this case, the court found that physical therapy was not "merely a conduit" to the child's education, but "constituted, in and of itself, a major portion of his special education."[79] Based on extensive evidence indicating that the child needed direct physical therapy by a licensed, trained professional, the court reversed the decision of the district court granting summary judgment to the school district and remanded the case for further proceedings.

Similarly, a New York federal district court noted that physical development was only one component in a student's program but was a "critically important" one.[80] Accordingly, the court issued a preliminary injunction requiring the school district to continue the child's physical therapy on a twelve-month basis. Expert testimony indicated that the orthopedically impaired student would experience significant regression in his upper body strength and his ambulation skills in the absence of a summer program. Although the physical therapy was not part of an educational program for the summer months, it was found to constitute "special education" under New York law ("specially designed individualized or group instruction *or* special services or programs . . . to meet the individual needs of pupils with handicapping conditions").[81]

In a unique situation, an insurance company demanded that a school district provide a trained attendant during the school day for a student with a tracheostomy.[82] Following injuries from an automobile accident, the insurance company had paid all medical expenses of the child, including the cost of the attendant. The federal district court dismissed the case, finding that the administrative procedures for determining special education needs and related services were only available to the parents and school district; the insurer had no standing to seek benefits or protection from the EHA.

DISCIPLINE

Most courts have agreed that the expulsion of handicapped students

77. 20 U.S.C. § 1401 (17).
78. Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3d Cir. 1988).
79. *Id.* at 176.
80. Holmes v. Sobol, 690 F. Supp. 154 (W.D.N.Y. 1988).
81. *Id.* at 159.
82. Allstate Ins. Co. v. Bethlehem Area School Dist., 678 F. Supp. 1132 (E.D. Pa. 1987).

for disciplinary reasons is a change in placement triggering the procedural safeguards of the EHA. In *Honig v. Doe*, the Supreme Court rendered its first decision addressing such exclusion.[83] The case involved two California students who were suspended indefinitely for dangerous behavior pending the outcome of expulsion proceedings. A California federal district court and the Ninth Circuit Court of Appeals entered summary judgment for the students, finding that the indefinite suspension was a prohibited change in placement and violated the stay-put provision of the EHA.[84]

On appeal, the state superintendent of public instruction urged the Supreme Court to recognize a "dangerousness" exception to the stay-put requirement.[85] The superintendent contended that Congress could not have intended that school officials return violent or dangerous students to the classroom during the lengthy EHA proceedings. Disagreeing, the Supreme Court stated that Congress deliberately stripped schools of the unilateral authority to exclude handicapped students. The history of exclusion of handicapped students prior to the enactment of the EHA and the early litigation that guided the development of the law convinced the Court that the conspicuous absence of an emergency exception was intentional.

The Court, however, emphasized that school officials are not without options when confronted with a dangerous student. They can use a range of normal procedures, including detention, use of study carrels, timeouts, and restriction of privileges. A student who is an immediate threat can be suspended for ten days, which, according to the Court, does not constitute a change in placement. If the child continues to pose a threat and the parents refuse to agree to a change in placement, school officials can seek injunctive relief from the courts, but bear the burden of showing that a child is truly dangerous to himself or to others.

Remedies

Compensatory Services

The Eleventh Circuit Court of Appeals compared the award of compensatory educational services to retroactive reimbursement of tuition costs; both are needed to ensure a child's right to a free appropriate education. The federal district and appellate courts agreed that an

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83. 108 S. Ct. 592 (1988).

84. *See* Yearbook of School Law 1987 at 131.

85. The case was moot for one of the students, who was 24 years old and no longer eligible for services at the time of review. Although the other student, who was 20, was not in school, he was still eligible for educational services and if he enrolled in a program could be subjected to unilateral exclusion again.

Alabama child was entitled to receive two years of compensatory education beyond the age of twen[t]y-one because the school district failed to provide an appropriate placement.[86] The appellate court noted that such awards should serve as a deterrent against school systems prolonging proceedings to reduce their potential liability. The Second Circuit Appellate Court awarded one and one-half years of compensatory education to a student deprived of an education during the pendency of a protracted hearing after the closure of his former school. The court commented that "[a]dministrative and legal proceedings are often lengthy, and a person who prevails at the end of such proceedings should be able to obtain what the proceedings establish he was entitled to when they began."[87] The Supreme Court of Wyoming, however, held that under state constitutional and statutory limitations a hearing officer had no authority to order compensatory services and the local district had no authority to the provide the services.[88]

Attorneys' Fees

Congress enacted the Handicapped Children's Protection Act (HCPA) in 1986 to grant courts the discretion to award reasonable attorneys' fees to parents who prevail against school systems. Fees are recoverable for any action or proceeding filed after July 3, 1984, or pending at that time.

Again in 1988, the most frequent controversy raised under the HCPA was the issue of attorneys' fees for administrative proceedings. The Sixth Circuit Court of Appeals rendered the first appellate level decision addressing whether an administrative hearing is an "action or proceeding" for which attorneys' fees can be awarded.[89] Similar to most 1988 federal district court rulings regarding recovery of fees for such proceedings,[90] the Sixth Circuit Appellate Court concluded that the legislative history showed a clear intent that attorneys' fees are available. Although

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86. Jefferson County Bd. of Educ. v. Breen, 694 F. Supp. 1539 (N.D. Ala. 1987), *aff'd*, 853 F.2d 853 (11th Cir. 1988).

87. Burr v. Ambach, 863 F.2d 1071, 1078 (2d Cir. 1988).

88. Natrona County School Dist. No. 1 v. McKnight, 764 P.2d 1039 (Wyo. 1988). *See* Monahan v. School Dist. No. 1 of Douglas County, 425 N.W.2d 624 (Neb. 1988); Natrona County School Dist. v. Ryan, 764 P.2d 1019 (Wyo. 1988) (education can be provided only until age 21); *see* text with note 5.

89. Eggers v. Bullitt County School Dist., 854 F.2d 892 (6th Cir. 1988).

90. Burr v. Ambach, 683 F. Supp. 46 (S.D.N.Y. 1988); Chang v. Board of Educ. of Glen Ridge Township, 685 F. Supp. 96 (D.N.J. 1988); Medford v. District of Columbia, 691 F. Supp. 1473 (D.D.C. 1988); Michael M. v. Board of Educ. of New York City School Dist., 686 F. Supp. 995 (E.D.N.Y. 1988); Neisz v. Portland Pub. School Dist., 684 F. Supp. 1530 (D. Or. 1988); Robert D. v. Sobel, 688 F. Supp. 861 (S.D.N.Y. 1988); Turton v. Crisp County School Dist., 688 F. Supp. 1535 (M.D. Ga. 1988); Sidney v. Ambach, 535 N.Y.S.2d 468 (App. Div. 1988).

Congress modeled the fee awards after other fee shifting statutes, the appellate court found the United States Supreme Court's decision in *North Carolina Department of Transportation v. Crest Street Community Council*, holding that fees are available under 42 U.S.C. section 1988 only if they are part of a lawsuit, distinguishable.[91] Unlike section 1988, the court noted that the EHA mandates exhaustion of a grievance at the local or state level. Furthermore, various provisions in the HCPA refer directly to the availability of fees for work conducted at the administrative level.

In a Virginia case, a federal district court confronted a request for attorneys' fees for services performed in a dispute resolved prior to the due process hearing.[92] Relying upon section 1415(e)(4)(D), which restricts fee awards if an offer of settlement is rejected by the parent before the administrative proceeding begins, the court stated that the "inescapable implication" is that fees can be recovered for services prior to an offer and thus before the commencement of official proceedings.

The District of Columbia Federal District Court awarded fees to parents' counsel for participation in the development of the individualized education program.[93] Although the school district argued that fees for assistance are prohibited, the district court, finding neither a requirement or prohibition in the law, concluded that fees were appropriate because counsel's presence contributed to the eventual success of the parents.

School districts continued to challenge the retroactive application of the attorneys' fees provision as violating the separation of powers and Congress's spending power under article I, section 8 of the Constitution. An Illinois federal district court held that the attorneys' fees provision does not violate the separation of powers because the substantive decision of the court is not affected.[94] Citing a recent Supreme Court decision, the district court noted that "a motion for attorneys' fees does not imply a change in the judgment but rather what is due as a result of the judgment."[95]

Several school districts, relying on the Supreme Court's decision in *Pennhurst State School and Hospital v. Halderman*, argued that the HCPA exceeded Congress's spending power since it retroactively im-

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91. 107 S. Ct. 336 (1986). *See* Yearbook of Education Law 1988 at 122-23; Counsel v. Dow, 849 F.2d 731 (2d Cir. 1988) (fees were available for an administrative hearing followed by a lawsuit).

92. Rossi v. Gosling, 696 F. Supp. 1079 (E.D. Va. 1988) (remanded for an evidentiary hearing to determine if parents were the prevailing party).

93. Medford v. District of Columbia, 691 F. Supp. 1473 (D.D.C. 1988).

94. Max M. v. Illinois State Bd. of Educ., 684 F. Supp. 514 (N.D. Ill. 1988), *aff'd*, 859 F.2d 1297 (7th Cir. 1988) (appellate court addressed "vested rights" only); *see* text with note 106.

95. *Id.* at 521.

posed conditions upon the receipt of federal funds.[96] The Supreme Court, however, did not hold that Congress could not retroactively condition the receipt of federal funds; rather, the Court held that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."[97] In examining the legislative history of the HCPA, the Second Circuit Court of Appeals held that the law was enacted not only under Congress's spending power but under the fourteenth amendment.[98] Accordingly, the court concluded that Congress did not abuse its authority because it acted pursuant to its fourteenth amendment enforcement powers and clearly expressed its intent to make the fees retroactive. The Fifth Circuit Court of Appeals and several federal district courts ruled similarly regarding this issue.[99]

School systems also raised the eleventh amendment as a bar against the award of attorneys' fees. In earlier decisions, most courts concluded that the EHA was enacted under the fourteenth amendment, and that Congress has the power to set aside sovereign immunity to enforce the fourteenth amendment. Two federal district courts adopted this position, concluding that fees were permissible.[100] Citing the Supreme Court's decision in *Hutto v. Finney*,[101] the Seventh Circuit Court of Appeals held that an award of attorneys' fees as part of costs does not violate a state's eleventh amendment immunity.[102] Fees were found to be permissible, prospective relief, not damages which are prohibited. The Fifth Circuit Appellate Court also followed *Hutto* and designated fees as costs.[103]

The HCPA provides that prevailing parents are eligible for fees if the action or proceeding was filed prior to July 4, 1984 or was pending on that date. Several school districts argued that to award fees in settled cases violated their "vested rights." Under the vested rights doctrine, a judgment is a type of property and legislatures have no greater power over that property than any other. The Seventh Circuit Court of Appeals

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96. 450 U.S. 1 (1981).

97. *Id.* at 17.

98. Counsel v. Dow, 849 F.2d 731 (2d Cir. 1988).

99. Fontenot v. Louisiana Bd. of Elementary and Secondary Educ., 835 F.2d 117 (5th Cir. 1988); Max M. v. Illinois State Bd. of Educ., 684 F. Supp. 514 (N.D. Ill. 1988); Turton v. Crisp County School Dist., 688 F. Supp. 1535 (M.D. Ga. 1988).

100. Max M. v. Illinois State Bd. of Educ., 684 F. Supp. 514 (N.D. Ill. 1988); Michael M. v. Board of Educ. of New York City School Dist., 686 F. Supp. 995 (E.D.N.Y. 1988).

101. 437 U.S. 678 (1978).

102. Tonya K. v. Board of Educ. of Chicago, 847 F.2d 1243 (7th Cir. 1988).

103. Fontenot v. Louisiana Bd. of Elementary and Secondary Educ., 835 F.2d 117 (5th Cir. 1988). *See* Georgia Ass'n of Retarded Citizens v. McDaniel, 855 F.2d 794 (11th Cir. 1988). The Eleventh Circuit Appellate Court noted that federal courts can assess costs of litigation against states and, as such, held that interest on those costs is not barred by the eleventh amendment.

held that vested rights were not affected in an Illinois case.[104] In this instance, the parties in 1984 deferred the issue of attorneys' fees until the Supreme Court rendered its decision in *Smith v. Robinson*.[105] After the Supreme Court's decision holding that fees were not available, the parents withdrew their claim, which the court equated to dismissal without prejudice. Since there had been no judicial disposition of the fee request, the school system was found to have no vested rights. Similarly, in a second case, the Seventh Circuit Appellate Court stated that "[t]o pass by a request in silence is not to put it beyond recall by subsequent legislation."[106] Again, the court held that vested rights are not involved when the court has not addressed and resolved the fee claim.[107] Where parents pressed their claim for attorneys' fees after *Smith* and a final judgment was rendered regarding fees, the Eleventh Circuit Court of Appeals denied relief.[108]

While courts are granted the discretion to award fees, only special circumstances justify denial. According to the Ninth Circuit Court of Appeals, special circumstances does not include "upsetting settled expectations" established prior to the enactment of HCPA; to accept such a position would effectively eliminate the Act's retroactive provision.[109] The court stated that two factors must be examined to determine if special circumstances exist for denial: "(1) whether awarding fees would further the congressional purpose in enacting the Education of the Handicapped Act, and (2) the balance of the equities."[110] A Virginia school district argued that a settlement at the pre-hearing stage constituted special circumstances justifying denial of fees.[111] While the federal district court rejected this position, it did order an evidentiary hearing to assess, inter alia, whether an award of fees was warranted based on the parties initial positions and subsequent changes in those positions.

The timeliness of the filings for attorneys' fees was contested in several cases. Since the EHA and the HCPA do not contain a statute of limitations, courts borrow an analogous state law provision. Two New York federal district courts rejected a state four month statute of limita-

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104. Tonya K. v. Board of Educ. of Chicago, 847 F 2d 1243 (7th Cir. 1988).
105. 468 U.S. 992 (1984).
106. Max M. v. New Trier High School Dist. No. 203, 859 F 2d 1297, 1299 (7th Cir. 1988).
107. *See also* Doe v. Watertown School Comm., 701 F. Supp. 264 (D. Mass. 1988). The lack of prior adjudication of a fee claim resulted in an award for an administrative hearing even though school officials did not have an opportunity to appeal the administrative decision because the parent moved to another community. The court found no evidence that the school system would have prevailed on appeal.
108. Georgia Ass'n of Retarded Citizens v. McDaniel, 855 F 2d 805 (11th Cir. 1988).
109. Abu-Sahyun v. Palo Alto Unified School Dist., 843 F 2d 1250, 1252 (9th Cir. 1988).
110. *Id.* at 1253 (case remanded for reconsideration under the appropriate factors).
111. Rossi v. Gosling, 696 F. Supp. 1079 (E.D. Va. 1988).

tions governing EHA claims as appropriate for HCPA.[112] In finding a three year statute applicable, the courts noted that actions for attorneys' fees do not involve the same urgency as concerns related to a child's placement or program. Furthermore, the longer time period was found to promote congressional intent to encourage fee claims for actions commenced prior to the enactment of the HCPA. An Illinois federal district court waived its own local rule requiring requests for fees to be filed by prevailing parties within ninety days after the final judgment.[113] Although the judgment in the case was rendered four months prior to the adoption of the HCPA, the defendants argued that the rule should be applicable at the point the amendments became effective. The district court disagreed, finding a Federal Rule of Civil Procedure, which requires claims to be filed within a reasonable time, to be appropriate. Because of the complexity of the case (five published opinions) and the parents' attempt to negotiate a fee settlement, twelve and one-half months was held to be reasonable for filing the fee petition. The decision was affirmed by the Seventh Circuit Appellate Court.[114]

Parents who do not prevail on all issues may not be entitled to full reimbursement for attorneys' fees. The standard for determining partial awards was established by the Supreme Court in *Hensley v. Eckerhart*, which provides that "where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained."[115] Accordingly, the Third Circuit Court of Appeals remanded a case with instructions that the fees should be based on the parents' procedural claim, which was the only successful claim, not the substantive issue related to the appropriateness of the child's program.[116] Similarly, in a Seventh Circuit Appellate Court decision, parents who achieved only "a fraction of the relief" sought were awarded 50% of the fee claimed.[117] "Extremely limited success" against a local school district did not justify an award of attorneys' fees in a Second Circuit case.[118] Under the *Hensley* reduction standard, considerable discretion resides with the district court in reducing the amount of an award. A Georgia federal district court accepted counsels' voluntary

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112. Michael M. v. Board of Educ. of New York City School Dist., 686 F. Supp. 995 (E.D.N.Y. 1988); Robert D. v. Sobel, 688 F. Supp. 861 (S.D.N.Y. 1988).

113. Max M. v. Illinois State Bd. of Educ., 684 F. Supp. 514 (N.D. Ill. 1988).

114. Max M. v. Illinois State Bd. of Educ., 859 F.2d 1297 (7th Cir. 1988).

115. Muth v. Central Bucks School Dist., 839 F.2d 113, 130 (3d Cir. 1988), *quoting* 461 U.S. 424 (1983).

116. *Id. See also* Abney v. District of Columbia, 849 F.2d 1491 (D.C. Cir. 1988) (partial reimbursement to be determined on remand).

117. Max M. v. Illinois State Bd. of Educ., 684 F. Supp. 514 (N.D. Ill. 1988), *aff'd*, 859 F.2d 1297 (7th Cir. 1988).

118. Counsel v. Dow, 849 F.2d 731 (2d Cir. 1988) (state defendants were required to pay fees).

agreement to a 13% reduction.[119] In contrast to the preceding decisions, the Oregon Federal District Court held that time expended in seeking unsuccessful injunctive relief was compensable because it was instrumental in achieving the parents' ultimate goal.[120]

The reasonableness of attorneys' fees was questioned in two District of Columbia cases.[121] The federal district court noted that reasonableness revolves around three issues: market rate, reasonable number of hours, and adequacy of documentation.[122] In spite of school officials' extensive challenges regarding the rate charged, adequacy of documentation, counsels' expenditure of time, general productivity of counsel, charges for all telephone calls, length of calls, and, according to the court, a host of other "nitpicking claims," all claims by plaintiffs' counsels were found to be reasonable. Again in 1988, the federal district court was troubled by District of Columbia school officials' routine "do not settle, do not pay" stance.[123]

The hourly rate for attorneys' fees is governed by the prevailing fee rates in the community. An Oregon school district objected to a fee request at the upper end of the local rate scale, but the federal district court, noting the absence of documentation that the rate was excessive, granted the request.[124]

According to the HCPA, a court may award reasonable attorneys' fees as *part of the costs* to the parents.[125] The District of Columbia Federal District Court requested further briefing in a case from the parties as to whether expert witness fees are "costs" under the statute.[126] A Georgia federal district court, however, held that expert witness fees were compensable even though the witness did not appear at the hearing but merely provided assistance in the preparation of the case.[127] Based on a prior agreement at oral argument, expert witness fees were awarded

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119. Turton v. Crisp County School Dist., 688 F. Supp. 1535 (M.D. Ga. 1988).

120. Neisz v. Portland Pub. School Dist., 684 F. Supp. 1530 (D. Or. 1988).

121. Holmes v. District of Columbia, 680 F. Supp. 40 (D.D.C. 1988); Medford v. District of Columbia, 691 F. Supp. 1473 (D.D.C. 1988). The two cases represented the consolidation of 31 cases in which attorneys' fees were requested against the District of Columbia School District. Although the school district argued that each case must be decided on an individual basis, the court held them to be related cases. Furthermore, the court found school officials' efforts to thwart and frustrate plaintiffs' counsels through endless delays, extensions, and pleadings to justify consolidation to conserve judicial resources.

122. *See also* Behavior Research Institute v. Ambach, 535 N.Y.S.2d 465 (App. Div. 1988) (insufficient documentation presented; timesheets required for review).

123. Medford v. District of Columbia, 691 F. Supp. 1473, 1483 (D.D.C. 1988). *See* The Yearbook of Education Law 1988 at 127.

124. Neisz v. Portland Pub. School Dist., 684 F. Supp. 1530 (D. Or. 1988).

125. 20 U.S.C. § 1415(e)(4)(B).

126. Kattan v. District of Columbia, 691 F. Supp. 1539 (D.D.C. 1988).

127. Turton v. Crisp County School Dist., 688 F. Supp. 1535 (M.D. Ga. 1988).

as part of costs along with attorneys' fees in a New Jersey case.[128] Expert witness fees also were included as part of costs in a Massachusetts case.[129]

While the HCPA allows attorneys' fees for *parents or guardians* of handicapped children, this does not preclude eighteen year old handicapped youths from seeking fees in their own name. The Fifth Circuit Court of Appeals found nothing in the legislative history to indicate that Congress intended to foreclose actions by students who have reached the age of majority.[130]

Two appellate courts addressed who is eligible to receive compensation for legal representation of parents. The Sixth Circuit Court of Appeals reversed a lower court's denial of an award of attorneys' fees to prevailing parents represented by publicly funded attorneys.[131] The court found that the legislative history of the HCPA showed a clear intent to provide fees regardless of whether attorneys were private or public organizations. The original language in the Senate's proposed bill placed a limitation on attorneys funded from federal, state, or local funds. A compromise was reached in the Conference Committee providing that all attorneys would be compensated at the prevailing rates in the community with no bonuses and multipliers permitted.

New Jersey law permits lay advocates to assist parents in administrative hearings but prohibits fees for legal representation. A lay advocate challenged the "no fee" rule as interfering with parents' rights to secure expert assistance and representation. The Third Circuit Court of Appeals held that the EHA did not preempt the state's authority to regulate the legal profession.[132] While the state law prevented a lay advocate from charging for legal representation, this did not limit parents' access to expert assistance. Experts could still participate in administrative hearings and collect fees for testimony, preparation of reports, consultation with parents, attendance at hearings, and other such services.

FEDERAL FUNDING

The federal government appropriates funds annually to the states for special education programs and services under EHA-B.[133] Of the total funds received, states must distribute 75% to local school districts. Funds allocated to school districts that are not expended revert to the

128. Chang v. Board of Educ. of Glen Ridge Township, 685 F. Supp. 96 (D.N.J. 1988).
129. Doe v. Watertown School Comm., 701 F. Supp. 264 (D. Mass. 1988).
130. Fontenot v. Louisiana Bd. of Elementary and Secondary Educ., 835 F.2d 117 (5th Cir. 1988).
131. Eggers v. Bullitt County School Dist., 854 F.2d 892 (6th Cir. 1988).
132. Arons v. New Jersey State Bd. of Educ., 842 F.2d 58 (3d Cir. 1988).
133. 20 U.S.C. § 1400(c).

state, and, likewise, unexpended state funds are returned to the federal government. Under the Tydings Amendment, school districts and states must obligate and expend all allocated funds prior to the end of each fiscal year succeeding the fiscal year of appropriation.[134] The Department of Education challenged Massachusetts' disposition of unexpended funds as not conforming to the Tydings Amendment. Massachusetts did not officially reallocate funds captured from local school districts until after the Tydings deadline. The state, however, argued that funds were redistributed to school districts for expenditures that had occurred during the Tydings period. In deferring to the Department of Education's interpretation of the amendment, the First Circuit Court of Appeals held that the funds must be *obligated and expended* during the time frame specified in the statute.[135] States do not have the discretion to obligate funds after the deadline for earlier expenditures; to permit the reallocation after the Tydings date would enable states effectively to avoid any return of funds to the federal government.

An Illinois appellate court held that the EHA prevented the state from seeking reimbursement from the estate of a deceased minor for the provision of educational services.[136] To qualify for funds under the EHA, states must assure all handicapped children a free appropriate public education. The state agreed that it could not obtain reimbursement from the minor or the minor's relatives, but argued that recovery could be sought from the settlement of a medical malpractice suit that caused the handicapping condition. While the court acknowledged that reimbursement from the malpractice settlement that caused the injury would appear to be fair, federal regulations do not authorize recovery. The court distinguished this determination from the valid contractual obligation that an insurance company might have to provide services. A tortfeasor is obligated only to reimburse expenses to the injured individual.

STATE LAW

Under Pennsylvania law, a state court upheld the secretary of education's determination that the Philadelphia School District must provide a hearing-impaired student transportation to a private clinic for unisensory auditory therapy twice a month.[137] Although the school district was

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134. 20 U.S.C. § 1225(b)(1).

135. Commonwealth of Mass., Dep't of Educ. v. United States Dep't of Educ., 837 F.2d 536 (1st Cir. 1988).

136. *In re* Guardianship Estate of Zarse, 529 N.E.2d 50 (Ill. App. Ct. 1988).

137. School Dist. of Philadelphia v. Commonwealth Dep't of Educ., 547 A.2d 520 (Pa. Commw. Ct. 1988).

providing multisensory therapy bi-weekly, the secretary found that the specialized unisensory therapy, focusing solely on the development of residual hearing, would be of assistance in the child's current program and in the future. The school district protested that it was not required to provide the best possible program but only one that enables a child to receive some educational benefit. Under Pennsylvania law, the court noted that an appropriate program is determined by "*how well the program satisfies the recognized needs* of the individual child," and the evidence indicated that the additional services were based on the needs of the child.[138]

A New York court interpreted the phrase "actual and only residence" in the state education law.[139] In this case, a child who had lived in a "family home at board" from birth was denied free public schooling when his parents moved to another state. Because the parents retained financial responsibility for the child and continued to participate in his educational program, the commissioner of education concluded that the residence of the child should be that of his parents. The court, however, found that the law, which provided that "children cared for in family homes at board . . . shall be deemed residents of the school district in which such family home is located," was not altered by the parents' acknowledgement of their financial obligation; the family home at board was the actual and only residence.[140]

A California appellate court upheld a trial court's issuance of a permanent injunction ordering a school district to permit the attendance of a student with AIDS and an award of attorneys' fees.[141] The school district argued that the permanent injunction was unnecessary because the child had been admitted under a preliminary injunction, and, furthermore, attorneys' fees were not warranted under state law. Rejecting the school district's claims, the court found that the child was in school "solely" because of the preliminary injunction, and there was no guarantee that the school district would not change its position. Attorneys' fees were found to be justified on the basis that the case involved the enforcement of an important right and resulted in the school district establishing a policy on AIDS and infectious diseases.

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138. *Id.* at 522, *quoting* Centennial School Dist. v. Department of Educ., 503 A.2d 1080, 1084 (1986).

139. Catlin v. Sobol, 532 N.Y.S.2d 1008 (Sup. Ct. 1988). The Second Circuit Appellate Court had earlier abstained from ruling in the case because the state courts had not interpreted the residency law. See Yearbook of Education Law 1988 at 129.

140. *Id.* at 1008.

141. Phipps v. Saddleback Valley Unified School Dist., 251 Cal. Rptr. 720 (Ct. App. 1988).

Discrimination Under the Rehabilitation Act, Section 504

The Rehabilitation Act of 1973, section 504, provides that "[n]o otherwise qualified handicapped individual . . . shall, solely by reasons of his handicap, be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance."[142] Section 504 is broader than the EHA and applies to educational and noneducational agencies receiving federal assistance. It prohibits recipients of federal funds from discriminating against handicapped individuals in educational programs and employment.

Students

Two courts issued preliminary injunctions allowing students with AIDS to attend school. An Illinois federal district court, in weighing the factors to determine if an injunction should be issued, held that it was likely at trial that the student would be found handicapped under section 504 because of the perception that a person with AIDS is impaired as well as the person having an actual physiological impairment of the hemic, lymphatic, and reproductive systems.[143] With the overwhelming consensus of the medical profession that there is no significant risk of transmission in the classroom, the court also concluded that the student would probably be found "otherwise qualified" to attend school. Additionally, failure to return the student to the classroom would result in irreparable injury in terms of his self-esteem and need to interact socially with other children, and no adequate remedy existed at law to compensate the child for this injury. Finally, the court concluded that the speculative risk to others did not outweigh the injury to the student. Another Illinois federal district court drew similar conclusions in issuing a preliminary injunction.[144]

Section 504 claims were raised in two higher education cases. The Sixth Circuit Court of Appeals affirmed a federal district court's decision that a student with retinitis pigmentosa (disease that causes loss of peripheral vision and loss of sight in reduced light) was not "otherwise qualified" for an optometry program because he could not fulfill the clinical proficiency requirements due to his handicap.[145] The appellate

142. 29 U.S.C. § 794.

143. Doe v. Dolton Elementary School Dist. No. 148, 694 F. Supp. 440 (N.D. Ill. 1988).

144. Robertson v. Granite City Community Unit School District No. 9, 684 F. Supp. 1002 (S.D. Ill. 1988). *See also* text with note 49, *supra* (both EHA and section 504 were used to assess the appropriate placement of a child with AIDS).

145. Doherty v. Southern College of Optometry, 862 F.2d 570 (6th Cir. 1988).

court concluded that the waiver of the requirement would not have been a reasonable accommodation; an institution is not required to eliminate course requirements which are necessary for a particular degree.

A student sought readmission to a law school, arguing that the university had discriminated against him on the basis of his handicap—alcoholism.[146] He claimed that he would have achieved the minimum grade required for retention "but for his drinking." Relying on the Supreme Court's holding in *Southeastern Community College v. Davis*,[147] the court noted that "the right inquiry is whether the person can satisfy the program's requirements despite his handicap."[148] The court stated that the Rehabilitation Act prohibits decisions based on stereotypes about a handicap but not reasoned judgments about performance related to the handicap.

Employees

The cases discussed in this section interpreting the Rehabilitation Act of 1973 involve employees in general rather than merely school personnel.

Handicapped Persons. To invoke the protections of the Rehabilitation Act employees must first establish that they are "handicapped" within the meaning of the Act. As defined by Congress, a handicapped individual is any person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.[149] In reviewing claims, courts first determine if there is an impairment, and then assess whether it substantially limits a major life activity.

Individuals suffering from alcoholism and drug addiction often assert claims that they are handicapped within the meaning of section 504. A 1978 amendment to the Act specifically states that the term handicapped "does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others."[150] In a New York City case, transportation workers argued that they were handicapped individuals because the city viewed them as drug abusers after positive drug-test results.[151] As handicapped individuals, they contended that their employ-

146. Anderson v. University of Wis., 841 F.2d 737 (7th Cir. 1988).
147. 422 U.S. 397 (1979).
148. Anderson v. University of Wis., 841 F.2d 737, 740 (7th Cir. 1988).
149. 29 U.S.C. § 706(7)(B).
150. 92 Stat. 2955, 2984-85 (1978).
151. Burka v. New York City Transit Auth., 680 F. Supp. 590 (S.D.N.Y. 1988).

ment could not be terminated unless it could be shown that drug use impaired their ability to perform their jobs. A federal district court rejected their claim, commenting that "[t]he notion that Congress would consider illegal drug abusers, as a general group, to be 'handicapped individuals' within the meaning of section 504 is antithetical to the goals of sound law enforcement and trivializes the commonly understood meaning of the word 'handicapped.'"[152] The court held that the intent behind the amendment was to protect otherwise qualified drug abusers who have been or are being rehabilitated.[153]

The Ninth Circuit Court of Appeals, relying on the Supreme Court's determination that individuals suffering from contagious diseases are handicapped, held (without discussion) that a person with AIDS is handicapped.[154]

Discrimination Claims. In a Supreme Court case, two recovering alcoholics claimed they had suffered discrimination under section 504 by the Veterans Administration's refusal to extend the time limit for the use of their educational benefits.[155] Veterans must use the benefits within ten years unless they were prevented from using them by "a physical or mental disability which was not the result of [their] own willful misconduct."[156] Because the Veterans Administration had consistently interpreted primary alcoholism as "willful misconduct" in all benefits statutes, the Supreme Court concluded that when Congress used the term in establishing the exception to the time limitation it intended to apply the long standing interpretation of willful misconduct. Furthermore, Congress's extension of section 504's prohibition against discrimination to include executive agencies indicated no intent to repeal the willful misconduct provision. In upholding the agency's denial of an extension, the Court emphasized that this is not a provision that treats handicapped persons less favorably than nonhandicapped persons but simply one that "provides a special benefit to disabled veterans who bear no responsibility for their disabilities."[157]

Section 504 prohibits discrimination in a person's job assignment and other working conditions. In a Nevada case, a handicapped teacher alleged discrimination on the basis of numerous facts: a temporary as opposed to a standard contract, the most difficult and demanding students, lack of normal assistance provided with the particular assignment, etc.[158] The federal district court, in awarding damages, stated that

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152. *Id.* at 597.

153. *See also* Wallace v. Veterans Admin., 683 F. Supp. 758 (D. Kan. 1988) (recovering drug abuser was a handicapped individual).

154. Chalk v. United States Dist. Ct. of Cent. Dist. of Cal., 840 F. 2d 701 (9th Cir. 1988).

155. Traynor v. Turnage, 108 S. Ct. 1372 (1988).

156. 38 U.S.C. § 1662(a)(1).

157. *Id.* at 1382.

158. Recanzone v. Washoe County School Dist., 696 F. Supp. 1372 (D. Nev. 1988).

"[i]n no instance was an affirmative effort made to recognize and acknowledge Miss Recanzone's known handicaps and to make reasonable adjustments and accommodations for them. This was what the law required. She was discriminated against solely on the basis of her handicaps."[159]

In a Seventh Circuit Court of Appeals case, a director of nursing, who was diagnosed as having multiple sclerosis, was denied her position after a medical leave of absence.[160] In spite of her physician's report that she was able to resume her job, the employer maintained that she was not capable of performing the assigned duties and that she had failed to provide the additional assurances of her ability as required. The appellate court concurred with the federal district court that her job was denied solely because of her handicap. The physician's original report was found to be adequate to establish that she could perform her duties; the employer could not require additional assurances that were unrelated to the specific position.

A physician challenged that her hospital staff privileges were terminated "solely" because of her narcolepsy (sleeping problem) handicap.[161] In vacating a jury verdict in her favor, a Michigan federal district court concluded that the evidence overwhelmingly showed that the physician's abusive behavior towards patients and hospital staff was the primary reason for termination. Also, the court noted that some concern about the uncorrected sleeping condition and its threat to the safety and welfare of patients did not constitute discrimination.

Otherwise Qualified Individuals. To establish a cause of action under the Rehabilitation Act, handicapped persons must establish that they are "otherwise qualified" for the position sought and that they were excluded from the position solely by reason of their handicap. Under the Supreme Court's standard, an otherwise qualified person is "one who is able to meet all of a program's requirements in spite of [the] handicap."[162]

In 1987 the Supreme Court remanded *School Board of Nassau County, Florida v. Arline* to the district court to determine if a teacher with a contagious disease, tuberculosis, was otherwise qualified for an elementary school teaching position.[163] To assess whether the person is otherwise qualified, the court stated that the following factors must be evaluated:

> [findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of

159. *Id.* at 1378.
160. Carter v. Casa Cent., 849 F.2d 1048 (7th Cir. 1988).
161. Ross v. Beaumont Hosp., 687 F. Supp. 1115 (E.D. Mich. 1988).
162. Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979).
163. 107 S. Ct. 1123 (1987).

> the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities that disease will be transmitted and will cause varying degrees of harm.[164]

The federal district court assessed each point and concluded that Arline was otherwise qualified to hold her teaching position.[165] The risk of transmitting tuberculosis to another person was found to be minimal, especially when the infected person is taking medication. During the brief period of time in which Arline tested positive, no member of her family contracted the disease. Because of the medical treatment available, the court found that the risk was not severe at the time her employment was terminated. Furthermore, the court concluded that the probability Arline could transmit the disease to anyone was "so small as to not exist."[166]

The Ninth Circuit Court of Appeals granted a preliminary injunction ordering the reinstatement of a teacher with AIDS.[167] Although the district court acknowledged that little risk existed of transmitting the disease, a preliminary injunction was denied because doctors were not "completely certain."[168] Finding this to be an impossible burden, the appellate court held that the standard established in *Arline* must be followed. That is, an employee may be excluded only if there is "a *significant* risk of communicating an infectious disease to others."[169] The appellate court further disagreed with the district court's conclusion that the fear and apprehension in the community outweighed the teacher's injury. Basing a decision on irrational fears and myths was found to thwart the purposes of section 504.

An Ohio federal district court ruled that an applicant who had suffered a heart attack was not otherwise qualified for employment with the postal service.[170] His medical condition had not been diagnosed as stable and he was subject to exercise-induced or exercise-related extra heartbeats.

Reasonable Accommodation for Otherwise Qualified Individuals. An otherwise qualified handicapped person is one who can perform the essential functions of a position with "reasonable accommodation." Several courts held that an "otherwise qualified" person is not

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164. *Id.* at 1131.
165. Arline v. School Bd. of Nassau County, Fla., 692 F. Supp. 1286 (M.D. Fla. 1988).
166. *Id.* at 1291.
167. Chalk v. United States Dist. Ct. of Cent. Dist. of Cal., 840 F. 2d 701 (9th Cir. 1988).
168. *Id.* at 707.
169. *Id.* at 708, *quoting* School Bd. of Nassau County, Fla., v. Arline, 107 S. Ct. at 1131 n.16 (emphasis added).
170. Bailey v. Tisch, 683 F. Supp. 652 (S.D. Ohio 1988).

simply someone who is able to meet *all* of the job requirements in spite of a handicap as specified in the Supreme Court's decision in *Southeastern Community College v. Davis*.[171] An essential aspect of assessing whether a person is "otherwise qualified" is determining whether reasonable accommodation would enable the individual to perform the job.[172] The Fifth Circuit Court of Appeals in discussing the meaning of "otherwise qualified" stated: "on the one hand, it refers to a person who has the abilities or characteristics sought by the grantee; but on the other, it cannot refer only to those already capable of meeting *all* the requirements—or else no reasonable requirement could every violate [section] 504, no matter how easy it would be to accommodate handicapped individuals who cannot fulfill it."[173]

Reasonable accommodation, however, does not require elimination or modification of an essential function of a position or program. In a case involving a handicapped postal service employee, the Sixth Circuit Appellate Court reversed a summary judgment and remanded the case for an individual determination of whether certain physical requirements were *essential* to the actual functioning of a position, not merely specified in the job description.[174] The Kansas Federal District Court held that accommodation was required for a nurse suffering from drug addiction.[175] While the hospital argued that a registered nurse must administer narcotics to patients, the court found this to constitute less than 2% of a nurse's time and concluded that reasonable accommodation could be made with job sharing or controlled patient assignments to enable the nurse to perform the essential functions of the position.

On the other hand, the Third Circuit Court of Appeals ruled that even if a police officer who was dismissed for drug use was a handicapped person he was not "otherwise qualified" to hold a law enforcement position. The court stated that "accommodating a drug user within the ranks of the police department would constitute a 'substantial modification' of the essential functions of the police department and would cast doubt upon the integrity of the police force."[176] An Ohio federal district court ruled that a paranoid schizophrenia employee who refused to take prescribed medication, which controlled her belligerent and violent behavior toward co-workers and the public, was not "otherwise qualified."[177] The employer was found to have made reasonable ac-

171. 442 U.S. 397 (1979).

172. *See* Brennan v. Stewart, 834 F.2d 1248 (5th Cir. 1988); Hall v. United States Postal Serv., 857 F.2d 1073 (6th Cir. 1988).

173. Brennan v. Stewart, 834 F.2d 1248 (5th Cir. 1988).

174. Hall v. United States Postal Serv., 857 F.2d 1073 (6th Cir. 1988).

175. Wallace v. Veterans Admin., 683 F. Supp. 758 (D. Kan. 1988).

176. Copeland v. Philadelphia Police Dep't, 840 F.2d 1139, 1149 (3d Cir. 1988).

177. Franklin v. United States Postal Serv., 687 F. Supp. 1214 (S.D. Ohio 1988).

commodation by reinstating her twice after violent incidents. Similarly, the District of Columbia Federal District Court held that a manic-depressive employee was not "otherwise qualified" because she was unable to perform an essential function of the job—to report to work and perform duties for the duration of the day.[178]

A handicapped employee cannot demand specific accommodations. In a Michigan case, the federal district court ruled that an employer's reassignment recognizing an employee's physical limitations provided reasonable accommodation; the employer was not required to transfer the employee to a position closer to her residence.[179] Additionally, most courts have held that accommodation must be made only in the position for which an individual was hired. The Maryland Federal District Court, however, ruled that an employer's established policy of reassigning handicapped employees to alternative jobs required consideration for all positions to which the employee might be reassigned.[180]

178. Matzo v. Postmaster Gen., 685 F. Supp. 260 (D.D.C. 1987).

179. Fowler v. Frank, 702 F. Supp. 143 (E.D. Mich. 1988).

180. Coley v. Secretary of Army, 689 F. Supp. 519 (D. Md. 1987). *See* Robinson v. School Dist. No. 1, Multnomah County, 759 P.2d 1116 (Or. App. 1988). Under Oregon law, a school district was not required to rehire a disabled teacher who did not hold the advanced degrees or certificates to quality for the available positions.